



INTRODUCTION TO COMMENTARIES ON
FISA, THE “WALL,” AND CROSSFIRE HURRICANE:
A CONTEXTUALIZED LEGAL HISTORY

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Upon the initial release of the DOJ IG Report on Crossfire Hurricane on December 9, 2019,¹ disinformation appeared merely somewhat pertinent to Crossfire Hurricane. Christopher Steele had a contractual relationship with the DNC to conduct opposition research, and political damage had been inflicted when he forwarded his information to the FBI and subsequently publicized the FBI’s actions in response. Hence, as noted by Senator Hawley during a Senate Judiciary Committee hearing on December 11, 2019, it was possible to view the entire Crossfire Hurricane affair as resulting from an ostensible domestic political disinformation scheme.² There was an apparent parallel to Ronald Rychlak and General Ion Mihai Pacepa’s book, *Disinformation*, because the patterns of disinformation campaigns (as described by Rychlak and Pacepa in 2013) mirrored Steele’s interactions with the FBI. But Rychlak and Pacepa were writing specifically about Soviet and Russian disinformation campaigns targeting the West. As of the initial IG Report, Steele’s actions, if considered “disinformation,” were merely domestic.

In a certain respect, the seeming domestic character of the ostensible Steele “disinformation” (or “counterintelligence”) concerns was a relief—the United States is already exhausted from three years of allegations about Russian influence and information warfare. Then,

¹ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION (2019) [hereinafter FISA IG REPORT].

² *Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 4:44:20 (2019) (statement of Senator Josh Hawley).

on April 15, 2020, several footnotes from the DOJ IG Report were declassified, revealing that the FBI had been aware that Russian intelligence operatives knew about Steele's election research as early as July 2016, before he approached the FBI (i.e., before the opening of the Crossfire Hurricane investigation and the engagement of FISA).³ And the FBI's counterintelligence investigation of Steele and his sourcing (and awareness that Russian intelligence knew about Steele's efforts) had not been incorporated into the FISA applications.⁴

Hence, while disinformation policy seemed pertinent at the outset in December 2019, the April 2020 footnote disclosures significantly increase the prominence of disinformation policy in the Crossfire Hurricane narrative. Contacted for his reaction in December, Professor Rychlak was kind enough to submit a Commentary, initially drafted between December 2019 and April 2020, and updated following the declassifications.

One potential way of viewing Crossfire Hurricane following the April 2020 disclosures is that disinformation concerns, and possibly a successful disinformation campaign, spilled not only into the national security law framework, but directly into the FISA internal review mechanisms which were so contentious in the 1990s.

Jeffrey Parker, a Professor of Evidence at George Mason University's Antonin Scalia Law School and a civil libertarian, contemplates FISA in the wake of Crossfire Hurricane from a bird's eye view. He finds significance in the impact of key strong-willed OI officials such as Mary Lawton and Allan Kornblum. Parker posits that the contentiousness of FISA's internal review mechanisms is a red flag: a stable legal framework ought to withstand individual volatilities and difficult cases. At the same time, the national security surveillance framework may be prone to bureaucratic fluctuations because it must foster intricate investigative and judicial review processes which

³ FISA IG REPORT, *supra* note 1, at 189 n.342 (initially redacted, then declassified); John Solomon, *FBI Repeatedly Warned Steele Dossier Fed by Russian Misinformation, Clinton Supporter*, JUST THE NEWS (Apr. 15, 2020), <https://justthenews.com/accountability/russia-and-ukraine-scandals/fbi-received-repeated-warnings-about-steele-informant>.

⁴ FISA IG REPORT, *supra* note 1, at 364.

accommodate both heightened executive power and Fourth Amendment scrutiny.

Mark Cummings, of Sher, Cummings & Ellis, represented Mark Felt, a.k.a. “Deep Throat,” when Felt was prosecuted for 1970s FBI investigative actions targeting the Weathermen and Al-Fatah. These were terrorist organizations whose activities fell on the border between foreign intelligence concerns and criminal activity. Felt maintained that his legal authority was sound because FBI Director Gray said he had secured executive (foreign intelligence) authority for the FBI. Felt was convicted, prepared an appeal, and was then pardoned by President Reagan.⁵ The Felt prosecution traces tension in the law between national security legal authority and criminal legal authority, likely to surface in any major reconsideration of the FISA framework.



⁵ See generally *United States v. Felt*, 502 F. Supp. 71 (D.D.C. 1980).